

SAMPLE WATER RIGHT FORFEITURE EXEMPTIONS

Statutory Appendix

ARIZONA

Ariz. Rev. Stat. § 45-188 (2008). Future rights acquired through appropriation; rights within service area of agricultural or municipal provider (*last amended 1995*)

C. Water rights appurtenant to lands within the exterior boundaries of an irrigation district, water users' association, ditch company or similar provider of water for agricultural and municipal uses, or within the service area of a municipal provider or a private water company, are not subject to abandonment or forfeiture if the water provider and its agents maintain an operable water delivery system within that district or service area with the total capacity to deliver the amount of water appropriated.

IDAHO

Idaho Code § 42-223 (2008). Exception or defenses to forfeiture (*last amended 2008 - Subsection (11) added*)

A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a *federal cropland set-aside program* shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a *municipal provider to meet reasonably anticipated future needs* shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is *not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes* including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a *ground water management plan* approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the *water supply bank* or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

(6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from *circumstances over which the water right owner has no control*. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

(7) No portion of a water right held by *an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members* shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

(8) No portion of a water right held by an *irrigation district* shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to chapter 11, title 43, Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a *water conservation practice*, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

(10) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for *mitigation purposes approved by the director of the department of water resources including* as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, *a water right transfer* approved pursuant to section 42-222, Idaho Code, *a water exchange* approved pursuant to section 42-240, Idaho Code, *or a mitigation plan* approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code.

(11) No portion of any water right with a beneficial use related to *mining, mineral processing or milling* shall be lost or forfeited for nonuse, so long as the nonuse *results from a closure, suspension or reduced production of the mine, processing facility or mill* due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

Idaho Code § 42-108A (2008). Leasing of water for hydroelectric generation -- Exception to requirement of application to change nature of use (*last amended 1981*)

Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources indicating the name of the owner of the right, the lessor, the lessee, the amount of water leased, the duration of the lease, and the proposed place of use and point of diversion. *Such a lease or leases shall not constitute a change in the nature of use of such water nor shall the same constitute an abandonment or forfeiture or any other diminution of such water right.*

NEW MEXICO

N.M. Stat. Ann. § 72-5-28 (2008). Failure to use water; forfeiture (*last amended 2002*)

A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, *except the waters for storage reservoirs*, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if *circumstances beyond the control of the owner have caused nonuse*, such that the water could not be placed to beneficial use by diligent efforts of the owner; and provided that periods of nonuse when *irrigated farm lands are placed under the acreage reserve program or conservation reserve program* provided by the federal Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period; and provided, further, that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the state engineer at any time and a proper showing of reasonable cause for delay or for nonuse or upon the state engineer finding that it is in the public interest, the *state engineer may grant extensions of*

time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated.

C. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

D. A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the four-year period for the period of the exemption, and the period of exemption shall not be included in computing the four-year period.

E. Periods of nonuse when the nonuser of acquired water rights is on active duty as a *member of the armed forces* of this country shall not be included in computing the four-year period.

F. The owner or holder of a valid water right or permit to appropriate waters for *agricultural purposes* appurtenant to designated or specified lands may apply the full amount of water covered by or included in the water right or permit to any part of the designated or specified tract without penalty or forfeiture.

G. Periods of nonuse when water rights are acquired and placed in a *state engineer-approved water conservation program*, by an individual or entity that owns water rights, *a conservancy district* organized pursuant to Chapter 73, Articles 14 through 19 NMSA 1978, *a soil and water conservation district* organized pursuant to Chapter 73, Article 20 NMSA 1978, *an acequia or community ditch association* organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, *an irrigation district* organized pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate stream commission shall not be computed as part of the four-year forfeiture period.

H. Water deposited in a lower Pecos river basin below Sumner lake water bank approved by the interstate stream commission or an acequia or community ditch water bank shall not be computed as part of the four-year forfeiture period.

N.M. Stat. Ann. § 72-12-8 (2008). Water right forfeiture (*last amended 2002*)

C. Periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the federal Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period.

D. Periods of nonuse when water rights are acquired and placed in a state engineer-approved water conservation program by an individual or entity that owns water rights, an artesian conservancy district, a conservancy district, a soil and water conservation district organized pursuant to Chapter 73, Article 20 NMSA 1978, an acequia or community ditch association organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation district organized pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate stream commission shall not be computed as part of the four-year forfeiture statute.

F. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

G. Periods of nonuse when the nonuser of acquired water rights is on active duty as a member of the armed forces of this country shall not be included in computing the four-year period.

H. The owner or holder of a valid water right or permit to appropriate waters for agricultural purposes appurtenant to designated or specified lands may apply the full amount of water covered by or included in that water right or permit to any part of the designated or specified tract without penalty or forfeiture.

I. Water deposited in a lower Pecos river basin below Sumner lake water bank approved by the interstate stream commission or an acequia or community ditch water bank shall not be computed as part of the four-year forfeiture period.

OREGON

Or. Rev. Stat. § 540.610. Use as measure of water right; forfeiture for nonuse; confirmation of rights of municipalities (*last amended 2005*)

(1) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:

(a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.

(b) A finding of forfeiture would *impair the rights of such cities and towns to the use of water*, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

(c) The *use of water, or rights of use, are appurtenant to property obtained by the Department of Veterans' Affairs* under ORS 407.135 or 407.145 for three years after the expiration of the period of redemption provided for in ORS 18.964 while the land is held by the Department of Veterans' Affairs, even if during such time the water is not used for a period of more than five successive years.

(d) The use of water, or rights of use, under a water right, if the owner of the property to which the right is appurtenant is *unable to use the water due to economic hardship* as defined by rule by the Water Resources Commission.

(e) The period of nonuse occurred *during a period of time within which land was withdrawn from use in accordance with the Act of Congress of May 28, 1956, chapter 327 (7 U.S.C. 1801-1814; 1821-1824; 1831-1837), or the Federal Conservation Reserve Program, Act of Congress of December 23, 1985, chapter 198 (16 U.S.C. 3831-3836, 3841-3845)*. If necessary, in a cancellation proceeding under this section, the water right holder rebutting the presumption under this paragraph shall provide documentation that the water right holder's land was withdrawn from use under a federal reserve program.

(f) The end of the alleged period of nonuse occurred more than 15 years before the date upon which evidence of nonuse was submitted to the commission or the commission initiated cancellation proceedings under ORS 540.631, whichever occurs first.

(g) The owner of the property to which the water right was appurtenant is unable to use the water because the *use of water under the right is discontinued under an order* of the commission under ORS 537.775.

(h) The nonuse occurred during a period of time within which the water right holder was using *reclaimed water in lieu of using water under an existing water right*.

(i) The nonuse occurred during a period of time within which the water right holder was *reusing water through land application* as authorized by ORS 537.141 (1)(i) or 537.545 (1)(g) in lieu of using water under an existing water right.

(j) The owner or occupant of the property to which the water right is appurtenant was unable to make full beneficial use of the water because *water was not available*. A water right holder rebutting the presumption under this paragraph shall provide evidence that the *water right holder was ready, willing and able to use the water had it been available*.

(k) The holder of a water right is *prohibited by law from using the water*. If the prohibition is subject to remedial action that would allow the use of the water, the water right holder shall provide evidence that the water right holder is conducting the remedial action with reasonable diligence.

(L) The nonuse occurred during a period of time within which the exercise of all or part of the *water right was not necessary due to climatic conditions*, so long as the water right holder had a facility capable of handling the full allowed rate and duty, and was otherwise *ready, willing and able* to use the entire amount of water allowed under the water right.

(m) The nonuse occurred during a period of time within which the water was included in a *transfer application pending* before the Water Resources Department.

(n) The *nonuse of a supplemental water right occurred during a period of time when the primary water right used in conjunction with that supplemental water right was leased as an in-stream water right* pursuant to ORS 537.348.

(3) Notwithstanding subsection (1) of this section, if the owner of a perfected and developed water right uses less water to accomplish the beneficial use allowed by the right, the right is not subject to forfeiture so long as:

(a) The user has a facility capable of handling the entire rate and duty authorized under the right; and

(b) The user is otherwise ready, willing and able to make full use of the right.

(4) *The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.*

(5) After a water right is forfeited under subsection (1) of this section, the water that was the subject of use shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities.

WASHINGTON

Wash. Rev. Code § 90.14.140 (2008). "Sufficient cause" for nonuse defined -- Rights exempted (*last amended 2001*)

(1) For the purposes of RCW 90.14.130 through 90.14.180, "sufficient cause" shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of:

(a) Drought, or other unavailability of water;

(b) Active service in the armed forces of the United States during military crisis;

(c) Nonvoluntary service in the armed forces of the United States;

(d) The operation of legal proceedings;

(e) Federal or state agency leases of or options to purchase lands or water rights which preclude or reduce the use of the right by the owner of the water right;

(f) Federal laws imposing land or water use restrictions either directly or through the voluntary enrollment of a landowner in a federal program implementing those laws, or acreage limitations, or production quotas;

(g) Temporarily reduced water need for irrigation use where such reduction is due to varying weather conditions, including but not limited to precipitation and temperature, that warranted the reduction in water use, so long as the water user's diversion and delivery facilities are maintained in good operating condition consistent with beneficial use of the full amount of the water right;

(h) Temporarily reduced diversions or withdrawals of irrigation water directly resulting from the provisions of a contract or similar agreement in which a supplier of electricity buys back electricity from the water right holder and the electricity is needed for the diversion or withdrawal or for the use of the water diverted or withdrawn for irrigation purposes;

(i) Water conservation measures implemented under the Yakima river basin water enhancement project, so long as the conserved water is reallocated in accordance with the provisions of P.L. 103-434;

(j) Reliance by an irrigation water user on the transitory presence of return flows in lieu of diversion or withdrawal of water from the primary source of supply, if such return flows are measured or reliably estimated using a scientific methodology generally accepted as reliable within the scientific community; or

(k) The reduced use of irrigation water resulting from crop rotation. For purposes of this subsection, crop rotation means the temporary change in the type of crops grown resulting from the exercise of generally recognized sound farming practices. Unused water resulting from crop rotation will not be relinquished if the remaining portion of the water continues to be beneficially used.

(2) Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:

(a) If such right is claimed for power development purposes under chapter 90.16 RCW and annual license fees are paid in accordance with chapter 90.16 RCW;

(b) If such right is used for a standby or reserve water supply to be used in time of drought or other low flow period so long as withdrawal or diversion facilities are maintained in good operating condition for the use of such reserve or standby water supply;

(c) If such right is claimed for a determined future development to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right, whichever date is later;

(d) If such right is claimed for municipal water supply purposes under chapter 90.03 RCW;

(e) If such waters are not subject to appropriation under the applicable provisions of RCW 90.40.030;

(f) If such right or portion of the right is leased to another person for use on land other than the land to which the right is appurtenant as long as the lessee makes beneficial use of the right in accordance with this chapter and a transfer or change of the right has been approved by the department in accordance with RCW 90.03.380, 90.03.383, 90.03.390, or 90.44.100;

(g) If such a right or portion of the right is authorized for a purpose that is satisfied by the use of agricultural industrial process water as authorized under RCW 90.46.150; or

(h) If such right is a trust water right under chapter 90.38 or 90.42 RCW.

(3) In adding provisions to this section by chapter 237, Laws of 2001, the legislature does not intend to imply legislative approval or disapproval of any existing administrative policy regarding, or any existing administrative or judicial interpretation of, the provisions of this section not expressly added or revised.